[HIGH COURT OF AUSTRALIA.]

THE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA . . . } CLAIMANT;

AND

THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

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SYDNEY, *March* 24, 25, 31.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Industrial Arbitration—Industrial dispute—Award—Retrospective award for period subsequent to that fixed for continuance—New dispute as to subject matter of award—Minimum rate of wages—Jurisdiction—Validity of Commonwealth legislation—Decision of Justice of High Court—Binding effect of decision—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *secs.* 4, 16, 18, 21AA, 23-25, 28, 29.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ. (*Isaacs*, *Rich* and *Powers* JJ. dissenting), that the provision in sec. 28 (2) that, in the absence of order to the contrary, the old award shall continue in force from the date of the expiration of the period therein specified until the new award is made, is a valid exercise of the power conferred by sec. 51 (xxxv.) of the Constitution.

Per Isaacs and *Rich* JJ.: (1) Sec. 28 (2) enacts for a period subsequent to the period fixed by the arbitrator an obligation by the direct will of the Parliament; (2) such an enactment is not within the power granted by sec. 51 (xxxv.) of the Constitution, and is therefore invalid.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Higgins*, *Powers* and *Starke* JJ. dissenting), that, apart from the final and conclusive effect of a finding of the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, where an award had fixed the minimum rate of wages and the period specified in the award for its continuance in force had expired, the Commonwealth Court of Conciliation and Arbitration had no power by a new award to fix the minimum rate of wages payable in respect of any time before the making of the new award.

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Per Knox C.J., *Isaacs* and *Rich* JJ.: Where the Commonwealth Court of Conciliation and Arbitration has made an award and the period therein specified for its continuance in force has expired, the effect of sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1918 as a matter of construction is that the Court has no power, by a new award, to make provisions different from those of the old award as to the same subject matter to operate for the period between the expiration of the specified period and the making of the new award.

Per Gavan Duffy J.: Apart from sec. 28 (2), while an award determining the questions in issue in an industrial dispute remains in force and binding on the parties to it, the questions so determined cannot form the basis of a new industrial dispute.

Federated Gas Employees' Industrial Union v. *Metropolitan Gas Co. Ltd.*, 27 C.L.R., 72, and *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co. Ltd.*, 28 C.L.R., 1, considered.

A Justice of the High Court had, before the expiration of the period specified in the award for its continuance in force, decided under sec. 21AA that an alleged dispute in which employees claimed a higher minimum rate of wages than that fixed by the award existed, as to that claim, as an industrial dispute extending beyond the limits of any one State.

Held, by *Higgins*, *Gavan Duffy*, *Powers* and *Starke* JJ. (*Knox* C.J., *Isaacs* and *Rich* JJ. dissenting), that the Commonwealth Court of Conciliation and Arbitration had, in that dispute, power by a new award to fix the minimum rate of wages as from the expiration of the period specified in the old award for its continuance in force, notwithstanding that the new award was not made before the expiration of that period.

CASE STATED.

On the hearing of a plaint in the Commonwealth Court of Conciliation and Arbitration by the Waterside Workers' Federation of Australia against the Commonwealth Steamship Owners' Association and a large number of other respondents, the President stated the following case for the opinion of the Full High Court :—

1. This Court has cognizance, by plaint filed on 30th October 1918, of the industrial dispute above mentioned.

2. In this dispute there are two hundred and seventy-nine respondents, most of whom were respondents bound by an award made on 1st May 1914.

3. The period specified in the previous award as the period for

which it was to continue in force was the period of five years from its date.

4. In the previous award the minimum rate of 1s. 9d. per hour was prescribed for members of the claimant organization, and no variation was granted or sought during the period of five years.

5. On 16th April 1919 it was decided by a Justice of the High Court in Chambers, under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, that the dispute alleged in the plaint existed as an industrial dispute extending beyond the limits of any one State as to certain matters, including the minimum rate of wages per hour.

6. At the hearing of the case the claimant union asked that any minimum rate prescribed for overtime hours, &c., as well as for ordinary hours, should be paid as from the date of the filing of the plaint or at the latest from 1st January 1919.

7. Certain of the respondents, represented by Mr. Adams and by Mr. Seale, asked that the new rates should be operative as from the date of the award.

8. On 13th October 1919, after the parties had spoken to the minutes of the award, I intimated my intention to make the new rates operative as to ordinary hours, but not as to overtime payment, &c., as from the expiration of the period specified in the previous award, 1st May 1919.

9. Objections having been taken as to the power of this Court to make the new rates operative as from 1st May 1919, I offered to state a case on the subject hereinafter mentioned should any of the respondents desire me. Mr. Adams intimated that he did not desire to have a case stated, and Mr. Seale had left for Sydney before 13th October, and I refrained from having the award drawn up till he and others had an opportunity to consider the matter of asking me to state a case.

10. No award has yet been sealed or even signed by me. No award has been drawn up or minutes lodged or settled under Part VI. of *Statutory Rules* 1905, No. 71, but if and when drawn up, and subject to the opinion of the High Court on this case, it will be dated as of 13th October 1919.

11. The plaint in this matter, the award of 1st May 1914, the

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decision of the High Court in Chambers, the transcript of the proceedings on 8th, 9th, 10th and 13th October 1919 and the document which I had before me in the discussion on that date are available for the High Court if required, and form part of this case.

12. I state this case in writing for the opinion of the High Court upon the following questions arising in the proceeding, questions which in my opinion are questions of law. The questions are :—

(1) Apart from the final and conclusive effect of the High Court finding under sec. 21AA, has this Court power to make the minimum wages payable as from the expiration of the period specified in the previous award, or as to any and what date earlier than the actual making of the new award ?

(2) Having regard to the final and conclusive effect of the decision of the High Court under sec. 21AA, has this Court power in this case to prescribe minimum wages as from 1st May 1919.

The case was first argued on 13th and 14th January and 3rd March 1920, before *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ., and was then directed to be reargued before seven Justices.

Owen Dixon, for the claimant. Assuming that by the first question it is intended to ask whether the Arbitration Court has power by an award to direct that the respondents shall pay to their employees the difference between the minimum wages awarded and those actually paid during the time between the institution of the plaint and the date of the award, apart from the existence of a prior award the Court has that power (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1)), and there is nothing in sec. 28 of the *Commonwealth Conciliation and Arbitration Act* to restrict the generality of that jurisdiction where there is a prior award in existence. Having regard to their context, the words " shall continue in force " in sec. 28 mean " shall be current " or " shall be operative." The section is not directed either to enlarging the force of an award or to

(1) 28 C.L.R., 1.

defining its force except in respect of a period of time. The words do not cover the position that during the period no other regulation of the same subject matter shall be made. The contrary view requires that to the words "shall continue in force" shall be added the word "exclusively." The furthest the words "shall continue in force" go is that during the period no inconsistent award shall be made, inconsistent in the sense that it prescribes duties inconsistent with those already prescribed. In *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (1) two different views were taken as to the effect of sec. 28—one that although a new dispute in fact might arise as to matters dealt with by an award, it was not a dispute within the meaning of the Act, and the other that although such a dispute was a dispute within the meaning of the Act, sec. 28 prevented the Court from making a new and different award on the same matters. As to the first view, the word "dispute" is used with the same meaning throughout the Act. A dispute as to a matter which has been the subject of an award is within the terms of the definition of "industrial dispute" in sec. 4; it comes within sec. 6, otherwise there might be a strike or a lock-out on account of it with impunity. If it comes within the definition, then under sec. 16 it is the duty of the President to settle it. Under sec. 18 the Arbitration Court has power to settle it, and secs. 23-25 provide the method of settling it. That being so, it would require very strong words indeed to prevent a dispute coming within the arbitral powers merely because its subject matter is the same as that in respect of which an award had already been made. If the words "shall continue in force" mean that the duty imposed is to continue to exist, the furthest their effect can be pressed is to prevent the imposing of obligations which are inconsistent with the obligations imposed by a prior award. Another answer to the contention for the respondents is that sec. 28 is to be read as meaning that the obligations created by an award are to remain until superseded by the Court.

[STARKE J. Is dissatisfaction with an award an "industrial dispute"?]

That is a question of fact depending on what has actually been

(1) 27 C.L.R., 72.

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done. The conclusion may be arrived at that it is a continuation of the old dispute, that it is not a dispute at all, or that it is an expression of dissatisfaction with what the Court has done. The basis of this special case is that there was a new dispute in fact. The words " shall continue in force until a new award has been made " in sec. 28 (2) assume that there may be a new dispute while the award is in existence, and bear out the view now submitted. If the contrary view were correct, the only dispute which could arise while the award is in existence would be a dispute as to what are to be the contents of a new award, and that is not an " industrial dispute " within the meaning of the Act. If the first question be answered in the negative, the answer should be qualified by adding that it is with respect to parties bound by the old award. The power to otherwise order given by the words " unless the Court otherwise orders " may be exercised in the new award which is made, that is, by any order which is inconsistent with the old award being in force. If this view of sec. 28 (2) is not correct, then sec. 28 (2) is not a valid exercise of the power conferred on the Parliament of the Commonwealth by sec. 51 (xxxv.), for it is not merely a limitation of the power of the arbitrator but a direct legislative provision dealing with disputes and preventing the arbitrator from dealing with them so far as regards the wages and conditions of labour during the particular period. The decision under sec. 21AA that a dispute existed is conclusive as to the power of the Arbitration Court by a new award to order payment of a sum in respect of work done in the past. The only dispute so decided to exist was a dispute as to a present demand in relation to wages for an antecedent time, and, once that decision is given, it cannot be traversed.

Maughan K.C. (with him *Beeby*), for the Darling Island Stevedoring Co. and other respondents. The plain and unambiguous meaning of sec. 28 (2) is that it prohibits the Arbitration Court from entering into an investigation of the conditions of employment which are already the subject of an existing award, during a period consisting of the period specified in the award and the period between the expiration of that specified period and the making of a

new award. A majority of the Justices supported that view in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (1), and the view of the minority is consistent with it. Sec. 28 has the effect of making a matter upon which an award has been made, *res judicata* as between the parties to th award. The intention of the Legislature was that the conditions set out in an award should be law as between the parties during the combined period mentioned in sec. 28 (1) and (2). Inasmuch as the arbitrator makes his award knowing the provisions of sec. 28, if he specifies a period and does not "otherwise order" he in substance makes an award to continue in force until a new award is made. Sec. 28 (2) is not unconstitutional, for it is no more than a limit of the power of the arbitrator. The Parliament could fix a period of one or more years for the continuance of awards, and in the same way it could enact sec. 28 (2). The duration of an award is not an "industrial matter" within the meaning of the Act. If sec. 28 (2) is a prohibition against the Arbitration Court making a new award in respect of the combined period, a decision under sec. 21AA cannot give jurisdiction to make such an award. That decision is consistent with the dispute found to exist being the same dispute as the dispute which had already been settled. In proceedings under sec. 21AA it would not be an answer that the dispute had already been the matter of an award.

Latham, for the Commonwealth intervening. Whichever meaning of sec. 28 (2) is correct, it is not unconstitutional. It is legislation "with respect to" arbitration under sec. 51 (XXXV.) of the Constitution. In view of the words "unless the Court otherwise orders" in sec. 28 (2), the whole matter of the duration of the award is left to the arbitrator.

Cur. adv. vult.

March 31.

The following judgments were read :—

KNOX C.J. The questions submitted for our decision by the special case raise for consideration three main points, viz. :—(1) What is the true construction of sec. 28 (2) of the *Commonwealth*

(1) 27 C.L.R., 72.

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Conciliation and Arbitration Act 1904-1915? (2) Is the enactment contained in that sub-section within the powers of the Commonwealth Parliament? and (3) What is the effect of the order made by *Higgins* J. under sec. 21AA on 10th April 1919?

On the first question I am of opinion that the provisions of sec. 28 (1) and (2) must be regarded as a limitation imposed by the Commonwealth Parliament on the power conferred on the Court of Conciliation and Arbitration to settle industrial disputes. By sec. 18 of the Act it is provided that that Court shall have jurisdiction to prevent and settle, *pursuant to this Act*, all industrial disputes. The effect of sec. 28 is, in my opinion, to limit the general power conferred on that Court by sec. 18 by providing that any award made by the Court under the Act shall "*continue in force*" for such period, not exceeding five years from the date of the award, as may be specified in the award, and for such further period as may elapse until the Court either makes a new award or makes an order determining the earlier award. This is, in my opinion, the plain meaning of the words used. The decision in the *Gas Employees' Case* (1), embodied in the answer to question 1, establishes that, subject to the power of variation of the award given by the Act, the Arbitration Court has no jurisdiction to make in respect of a subject matter already covered by an existing award a new award which would take effect during the period specified in the earlier award as that during which it was to continue in force. It follows from this decision that the Arbitration Court would have had no jurisdiction to make an award in this case for the payment of wages at higher rates than those prescribed in the earlier award in respect of the period antecedent to 1st May 1919. The question remains whether the decision of the majority in that case on that question applies to the period between 1st May 1919 and the date of the making of the new award as well as to the period prior to 1st May 1919.

Assuming the power of Parliament to enact the provision contained in sec. 28 (2), further questions were raised, whether the order contemplated by the words "unless the Court otherwise orders" could not be made to take effect from a date before that on which it was made, and whether the power given to the Court to order otherwise

(1) 27 C.L.R., 72.

would not be well exercised by the making of a new award containing a provision differing from that contained in the previous award in respect of subject matter dealt with by both awards. In my opinion the power given to the Court by the section to order otherwise is a power to be exercised prospectively only, and the Court has no power by its order to put an end to the previous award from a date earlier than that on which the order in question is made. Nor do I think that by a new award the Court can substitute for the provisions of the old award different provisions in respect of the same subject matter, except in respect of a period subsequent to the making of the new award or to the making of an order putting an end to the old award. I think it is clear, from the nature of the provisions of sec. 28 and from the circumstances with respect to which Parliament was legislating, that the main object of the section was to ensure that when once an award had been made in any industry, then on any given day both employers and employees might know with certainty by what award their relations were regulated, and what were the prescribed conditions of employment. This object would be liable to be defeated if the Court could, by a retroactive order, alter as from a date before the making of such order the conditions of employment prescribed by an earlier award. The only way to ensure the section attaining the object mentioned above is by construing it as limiting the power of the Court to make a new award, or an order putting an end to an existing award, to awards and orders which regulate the conditions of employment from the date on which they are made or from a subsequent date. Of course, this section is limited in its application to cases in which an award has already been made, and has no application to cases coming before the Court for the first time. In my opinion the construction which I have placed on the section is in accordance with the natural meaning of the words used, irrespective of the results which may flow from such construction. It follows, from what I have said as to the meaning of sec. 28 (1) and (2), that in my opinion the question raised as to the effect of sec. 28 (2) is covered in principle by the answer to question 1 in the *Gas Employees' Case* (1).

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The second question is whether the enactment contained in sec. 28 (2) of the Act is within the power of the Commonwealth Parliament. Under sec. 51 (xxxv.) of the Constitution the Parliament has power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. This power may be paraphrased as a power to make laws with respect to the prevention or settlement of industrial disputes subject to two conditions, viz., that the prevention or settlement shall be effected by means of conciliation and arbitration, and that the disputes to be dealt with shall be confined to those which extend beyond the limits of one State. It is clear that this power does not authorize the Commonwealth Parliament to regulate conditions of employment by direct legislation, *e.g.*, to prescribe by Act of Parliament the minimum rate of wage to be paid or the maximum number of hours to be worked. It is, I think, equally clear that the power in question does authorize the Commonwealth Parliament to set up a tribunal with plenary and unrestricted power to prevent or settle two-State industrial disputes by conciliation and arbitration. It follows, in my opinion, that the Commonwealth Parliament has power to prescribe by legislation the manner in which, and the conditions on which, the tribunal so constituted shall carry out its functions and exercise the jurisdiction conferred upon it. The Commonwealth Parliament cannot settle a dispute or make an award by legislative enactment, but it has power, in my opinion, to enact that the tribunal which is set up for the purpose of settling industrial disputes shall, if it makes an award, comply with conditions prescribed by Parliament. This power to constitute a tribunal with plenary power to act according to its unfettered discretion, in my opinion, carries with it power to constitute a tribunal for the same purpose with circumscribed or limited powers. In effect, sec. 28 of the Act provides that if the tribunal constituted under the Act determines to make an award it shall only do so upon the condition that such award shall continue in force during the period not exceeding five years to be specified in the award, and during such further period as may elapse between the expiration of the period so specified and the making by that tribunal of a new award or of an order putting

an end to the first mentioned award. It cannot be successfully contended that it was beyond the power of Parliament to enact both a minimum and a maximum period for the continuance in force of any award that might be made under the Act, and in my opinion it is clear that the two sub-sections of sec. 28 in effect do no more than this, though a power is reserved to the Court of Arbitration to put an end to an award at any time after the expiration of the "specified period" referred to in sub-sec. 1. Under this provision the continuance in force of an award beyond the specified period is placed absolutely under the control of the tribunal constituted by the Act, and I cannot find in the provisions of this section any attempt on the part of Parliament to prescribe conditions of employment by legislative enactment. In my opinion, this Court should not exercise its undoubted power to declare a legislative enactment of the Commonwealth Parliament to be beyond its power, unless the invalidity of the enactment challenged is clear beyond all reasonable doubt. In the present case I am satisfied, for the reasons which I have given, that, so far from this being the case, the provisions of sec. 28 (2) are clearly within the power of the Commonwealth Parliament.

The third question arises on question 2 submitted by the special case. It appears from the statement in the case (par. 5) that "on 16th April 1919 it was decided by a Justice of the High Court in Chambers, under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, that the dispute alleged in the plaint existed as an industrial dispute extending beyond the limits of any one State as to certain matters including the minimum rate of wages per hour." It will be observed that the question submitted by the special case relates not to the power of the Justice to make the order of 16th April, but to the power of the Commonwealth Court of Conciliation and Arbitration, that order having been made, to embody in its award provision for payment of the increased rate of wages as from 1st May 1919. In the view which I take of the construction of sec. 28 (2) of the Act, Parliament by that enactment has expressly denied to the Court of Arbitration power to embody this provision in the award now under consideration, and the question really is whether a decision of a Justice of the High Court under sec. 21AA

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can avail to enable the Court of Arbitration to make an award which Parliament has forbidden that Court to make. The argument of Mr. *Dixon* for the claimant on this part of the case was, at first, founded principally on the decision of this Court in the *Gas Employees' Case* (1), though on a subsequent occasion he attacked that decision. Question 2 in that case was :—" Am I justified in finding that there is an industrial dispute existing within the meaning of the Act on the subjects of the said claims ? And if the said Court is not competent to entertain the said claims, am I still justified in finding as aforesaid ? " To this question the Court answered " No." It was contended that this amounted to a decision that the Justice acting under sec. 21AA had no power to decide that a dispute existed with respect to a given matter unless the Arbitration Court had power to award in accordance with the claim on that matter, and that, conversely, if a Justice decided under sec. 21AA that a dispute existed with respect to a given matter, his decision necessarily involved a decision that the Arbitration Court had power to award in accordance with the claim on that matter. Consequently, it was said, the decision under sec. 21AA in the present case that a dispute existed as to the rate of wages claimed, the claim being for an increased rate from the date of making the claim, necessarily involved a decision that the Arbitration Court could make an award in accordance with such claim, and that, this matter having been decided under sec. 21AA, the decision was binding for all purposes in the matter in which it was made, at all events as between the parties to that matter. I suggested during the argument that, having regard to the form of the question " Am I justified," the decision in the *Gas Employees' Case* might be held to amount to no more than a decision that the Justice ought not to make the declaration in question on the ground that if he made it, it would be futile, the Arbitration Court being prevented by sec. 28 (1) from giving effect to the declaration. A careful perusal of the reasons given by the four Justices constituting the majority of the Court in that case shows that *Barton* J. and my brother *Gavan Duffy* arrived at their conclusions on the ground that the only dispute which came within the provisions of the Act was a dispute which could be settled by

(1) 27 C.L.R., 72.

an award, and that as sec. 28 (1) prevented the Arbitration Court from making an award on a matter covered by an existing award such a matter could not be the subject of an existing dispute. My brothers *Isaacs* and *Rich* appear to have relied on the ground that the function of the Justice under sec. 21AA was merely to decide whether there was a *dispute in fact* of such a nature as to attract the jurisdiction of the Arbitration Court, and that that Court could only deal with the dispute so found to exist "pursuant to the Act." Consequently they were of opinion that the decision under sec. 21AA was not relevant to the question whether the Arbitration Court could make an award on any matter comprised in the dispute which was declared to be an existing dispute. I have had the opportunity of reading the judgment of my brothers *Isaacs* and *Rich* now about to be delivered, and find that their interpretation of their attitude in the *Gas Employees' Case* (1) confirms my view of the reasoning on which their decision was based. The actual answer given to question 2 in that case being, as I have shown, the result of two independent lines of reasoning, it is necessary for me to consider to what extent I am bound in the present case by the decision of the Court in the earlier case (represented by the question and answer) or by the reasons which led to that decision. After consideration, I have arrived at the conclusion that it is open to me in the present case to hold that the decision given by a Justice under sec. 21AA that a dispute exists as to a given matter amounts to no more than a declaration that a dispute *in fact* exists about that matter, and that that dispute is of such a nature (*i.e.*, extending beyond the limits of one State) as to attract the jurisdiction of the Arbitration Court to inquire into it and to make an award pursuant to the Act in respect of it—that is to say, an award complying with the conditions and limitations imposed by the Act on the power conferred on the Arbitration Court to make awards. I do not think the decision in the *Gas Employees' Case* compels me to hold, contrary to my opinion, that the decision under sec. 21AA given in this case on 16th April 1919 amounted to a final and conclusive decision binding on this Court in this matter and between these parties that the Arbitration Court

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had power to award an increased rate of wages as from 1st May 1919, a date antecedent to the making of the award.

I am therefore of opinion that both questions should be answered in the negative.

ISAACS AND RICH JJ. (read by ISAACS J.). We are of opinion that the arbitrator has power to make the minimum wages payable as from the expiration of the period specified in the previous award.

1. *Prior Decision.*—We come to this conclusion upon our own interpretation of the law, and not by reason of anything decided by the single Justice under sec. 21AA of the Act on 16th April 1919. As to that decision, the statement regarding it as set out in the case stated by the learned President is explicit. It is contained in par. 5 of the case, and, from the facts so appearing and the documents incorporated with the case, we are not at liberty to depart. It there appears to have been a decision that (1) the dispute alleged in the plaint existed, and (2) that it existed as " an industrial dispute extending beyond the limits of any one State, as to certain matters including the minimum rate of wages per hour." In other words, all that was decided was as to (1) the existence, (2) the nature of the dispute. It has, however, been suggested that it is connoted by the decision that the dispute was cognizable by the Court under sec. 19, and that under secs. 23 and 24 the Act gives power to deal with the claim on the merits.

The position seems to us to be as follows :—The decision of 16th April 1919 did not expressly include any question as to the effect of sec. 28 (2). It is urged that in finding that an " industrial dispute " existed it meant not simply an industrial dispute in fact, but one which there was jurisdiction to deal with on its merits. We regard the definition of " industrial disputes " to be like the same term in the Constitution, the simple expression of a fact. This is the only interpretation which gives efficacy to the Act as a whole, and to some of the most important sections in particular: for instance, in sec. 2, setting out the objects of the Act, the definition of " industrial dispute " in sec. 4, secs. 6, 16, 16A and sec. 18. The *Gas Employees' Case* (1) contains nothing inconsistent with this.

(1) 27 C.L.R., 72.

In that case, our judgment—recognizing the existence of the new dispute in fact—was directed rather to the substantial contentions of law raised in argument than to the literal frame of the question submitted. We came to the conclusion that by sec. 28 (1) Parliament prevented the making of the new award that was sought to be made in the new dispute covering so much of the time as was included in the "specified period" of the old award. We considered that any finding of the Court under sec. 21AA that there was a new dispute in fact would have been utterly futile, and consequently, in that sense, the Court was not "justified" in going through the useless form of deciding that the dispute in fact existed. We have no hesitation in saying that so far as our judgment is concerned it should not be taken *e converso* as deciding that, where a Court is justified in finding, and does in fact find, that a dispute "exists," that finding is to be taken as including a decision of all questions of law, constitutional or otherwise, and that the Court can lawfully proceed to do anything it pleases in relation to the claims. On the present reargument the whole question of sec. 28 (1) having been reopened, we adhere to the views we expressed in the *Gas Employees' Case* (1), except that on fuller consideration we think Parliament has not given the power of variation after the specified period has elapsed. In the first sub-section the provision that the award is to continue in force is expressly qualified by the words "subject to any variation ordered by the Court"; in the second sub-section these words are not merely omitted, but are replaced by different words having quite another effect. It is impossible, we think, to imply the words so deliberately altered, but, with that exception, we adhere to every word we said in the *Gas Employees' Case*. As we read the decision under sec. 21AA—stated so plainly in clause 5 of the present case—no questions of law beyond what are necessarily involved in the existence of a dispute, just as in the existence of a contract, were involved. The effect of sec. 28 (2) on the dispute that is found to "exist" was not, on that occasion, the subject of decision. If it had been, then the principle that would apply is not private estoppel—because there can be no estoppel against the provisions of an Act of Parliament limiting the jurisdiction of a

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public tribunal; nor is it truly *res judicata*—which properly applies to a decision in another suit, and not to a decision in a former stage of the same suit (*Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (1). But as it would, in that event, have been a binding decision so far as this case is concerned, as binding as if it had been competently given by the Full Court, there could be no contrary decision given in the present proceeding. As the Privy Council said in the case last cited :—" The binding force of " the former " judgment depends . . . upon general principles of law. If it were not binding there would be no end to litigation." And this principle of ending litigation was again stated by Lord *Macnaghten*, in *Badar Bee* v. *Habib Merican Noordin* (2), in these words : " It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal." There having been, however, no decision but one of the actual existence and nature of the dispute, the utmost that can be said is that the Arbitration Court had jurisdiction to entertain the claim, to deal with the objections in law or in fact to the claim or to any particular part of it, and make such order in relation to the claim or any part of it as is right, having regard to the requirements or authority of the law. As to what the law does in fact provide may be done with relation to the dispute in whole or in part, was left entirely open. On the present case stated, the question we have to consider is whether the law says that such part of the dispute as is covered by the provisions of sec. 28 (2) can be made the subject of an award, and our decision must be founded on our own independent interpretation of the law, and not upon the decision of the single Justice of 16th April 1919.

2. *Construction.*—Dealing, then, with the law, the first question is the proper construction of sec. 28 (2). In other words, what did Parliament mean when it said " After the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new award has been made " ? The expression " expiration of the period so specified " has reference to the first sub-section of sec. 28, and it is necessary to understand that sub-section before we get the full meaning of sub-sec. 2. Putting

(1) 11 Ind. App., 37, at pp. 41-42; I.L.R., 6 All., at p. 274.
(2) (1909) A.C., 615, at p. 623.

that sub-section, so far as now material, into ordinary English, it says in effect to the arbitrator: "In making an award, you are to fix some specific period for which it is to last, and, in arriving at your decision as to wages, hours and other conditions, you are to settle them with reference to that fixed period, so as to give stability to the industry, assuring to the employers and employees alike a certainty as to those conditions, and (subject to variations within the range of the dispute) binding them all for that period, and, as a matter of necessary consequence, tying your own hands for the same period."

One of the things the arbitrator has to bear in mind is that, for the period he selects, he ties his own hands except for the power of variation within the ambit of the dispute. He is not bound to tie his hands for five years. He may choose a shorter period, but, if he selects five years, that is the maximum. That is the decision in the *Gas Employees' Case* (1), and that is the scheme which Parliament has so far adopted. The words of the sub-section seem perfectly plain to us. Parliament has not left the slightest doubt in our minds as to its meaning and its policy, and therefore in our judgment in the *Gas Employees' Case* we made no suggestion as to declaring its meaning or altering that policy. The first was unnecessary, because the meaning was plain, and the second would, we think, have been beyond our province. We did, however, think that quite consistently with preserving its declared policy Parliament had possibly overlooked the question of "abnormalities" which, arising from causes not to be foreseen or anticipated when the award was made, might destroy its basis and fundamental justice, and we ventured to suggest consideration of that aspect, a suggestion which we here take occasion to repeat.

The meaning of the "specified period" in sub-sec. 1 being clear, we are now in a position to consider sub-sec. 2. The words "expiration of the period so specified" mean the expiration of whatever period the arbitrator has selected for the total duration of the award; in other words, when the new rights and obligations created by the award shall end. Then sub-sec. 2 goes on to enact what shall happen independently of the

(1) 27 C.L.R., 72.

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arbitrator and of anything he says. Indeed, he may have limited the term of the award expressly to one year, and refused any further time because he considered it unjust that the obligations and rights should continue for a day longer; or he may have had before him a dispute limited to a specific period, as a single season's shearing, or he may, of his own volition, have limited his award to that one season. Nevertheless, Parliament in sub-sec. 2 says that by virtue merely of its own will, and apart from any consideration of what may be just and fair in the circumstances, or how far it affects the decision or the balance arrived at by the arbitrator, the award shall, irrespective of the circumstances, continue to operate. And for how long nobody knows: not even does the arbitrator know, because, when (say in 1914) he makes his award for five years, he cannot then tell whether sub-sec. 2 is going, in fact, to extend it for a day, or a month, or for ten years. But sub-sec. 2 is entirely outside arbitration, and is purely "direct action" by Parliament. True, it contains the words "unless the Court otherwise orders," but that does not make the *extension* the affirmative act of the arbitrator. It makes the *prevention* or *cessation* of the extension his negative act. In other words, it is cessation by arbitration, but active obligation by Parliament alone. At any time after the expiry of the period during which his hands are tied by the award, the arbitrator is empowered to make an order declaring that the award shall not operate an instant longer. We say "after the expiry of the period," for this reason. The whole scheme of the Act, like that of the constitutional foundation, is, in our opinion, that no person shall have his industrial rights affected except after examination of the relevant circumstances of the dispute by an arbitrator, and his decision thereon. And when an award is once arrived at for a definite specified period as its just limit of continuance, the mere fixation of that limit means that it is, in the opinion of the arbitrator, then to cease. But since Parliament has required him, when making the award, to state definitely its farthest limit by specifying the terminal date, it is, in our view, impossible to construe the enactment as intending that if nothing more was said by him he was adding a further term, or that if, when saying "three years" as the furthest limit, he was expected to emphasize

it by adding "and no longer." That would, we apprehend, be attributing to Parliament an inconsistency which we do not think exists. But giving the full natural meaning to the terminal effect of the "specified period" under sub-sec. 1, and to the *primâ facie* effect of the further independent continuance under sub-sec. 2, the order to the contrary, if any, falls into the period after the specified period has expired. The sub-section means, in our view, that the award, limited to a fixed period by the arbitrator, is to continue simply by force of the legislative will, unless the arbitrator after that period otherwise orders—which consistently with the scheme of the Act means, unless having regard to the then existing circumstances he thinks it more just that the *primâ facie* rule established by Parliament shall not prevail. An order to the contrary by the arbitrator would clear the ground at once for his new award, if he saw a new dispute was the subject of a claim before the Court. It is not necessary to say whether that order can be made *ex mero motu* or only on application. No doubt a temporary gap might occur if such an order were made, but, as the matter would be in the arbitrator's own hands, it would be no different from any ordinary case of claim where no prior award has been made at all. The position in that case is as stated by *Rich* J. in his judgment in *Federated Engine-Drivers' &c. Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1). If the parties can rely on justice being done retrospectively in one case, they can be assured of it in the other. But, as we have said, the power to make an order terminating the operation of the award is not equivalent to making the extension itself the act of the arbitrator. If, for instance, in dealing with sec. 80 of the Constitution, which says that the trial on indictment of an offence against any law of the Commonwealth shall be by jury, Parliament were to say that in every such case a verdict of guilty shall be recorded against the prisoner unless the jury shall pronounce him not guilty, leaving them the negative power, it could not be reasonably said that the affirmative verdict of guilty was the act of the jury. If, again, an Act of Parliament were to empower a Judge to sentence a prisoner up to ten years' imprisonment, and then were to add that the prisoner shall also pay a fine of £100 unless

(1) 28 C.L.R., at p. 21.

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the Judge otherwise orders, the imposition of the fine, when the Judge is silent regarding it, would not be a judicial but a legislative act. But those instances are precisely analogous to the present case. If the statutory verdict of guilty is not the verdict of the jury, although in one sense they may control the situation, and if the statutory fine is not the order of the Judge, though in the same sense he may control it; neither is the statutory extension of the mutual rights and obligations beyond the currency of the award, at a time when common law or State statutory obligations are prevailing, the act of the arbitrator, although in the same sense he may control the situation. Neither are we able to regard it as a "condition" on which he is to make his award. He has nothing to do with it. It is not for him to adopt or not to adopt the provisions: he cannot refuse to do his duty merely because Parliament has enacted sec. 28 (2). If he were actually and expressly to state in his award that he directed it to last five years and thereafter until he made a new award, or until he made an order terminating it, it would be bad, because exceeding the maximum period of his authority and in violation of sub-sec. 1. If he cannot directly exceed the five years, he cannot be supposed to do so inferentially. In short, sub-sec. 2 is always independent of him as far as positive extension is concerned. That is a matter of construction. This statutory extension being the clear direct will of Parliament, subject only to a negative power in the arbitrator, which in this case he did not exercise, it follows that, in addition to the period specified under sub-sec. 1, his hands are further tied by Parliament of its own volition by sub-sec. 2. If this procedure be competent to Parliament, it is transparently clear to us that the questions put to us in the special case would have to be answered in the negative.

3. *Validity.*—But is such a provision valid? In our opinion, clearly not. It was taken from the New Zealand Act of 1900, No. 51, sec. 86, proviso to sub-sec. 1. That is, of course, a provision competent to a plenary Legislature, having full power to legislate as to industrial disputes, whether by way of arbitration or otherwise. But the power of the Federal Parliament in this respect is limited by sec. 51 (xxxv.) to "*arbitration*" for the settlement or prevention of *industrial disputes.* Parliament may give what powers it pleases

to the arbitrator; it may limit his powers as it pleases; it may make the exercise of these powers conditional, and may make any determination of the arbitrator law. But it cannot, consistently with the terms of its legislative power in relation to industrial disputes, impose any obligations or alter rights by any provision which dispenses with arbitration; it cannot go beyond the actual decision of the arbitrator, or alter his decision, or make any provision for settlement of the dispute binding that does not involve his own decision, or that extends beyond his own decision or adoption. The settlement, the complete settlement, of industrial disputes is limited to "arbitration," which consists in judicial examination into the circumstances of each particular case as to how, and for how long, ordinary rights should be varied in the interests of industrial peace. And all the ancillary provisions of the law that we find in the Act so far as they are valid must be incidental only to the arbitrator's own decision. But if Parliament can, irrespective of the merits of the particular case, make a general enactment, operating mechanically and setting aside ordinary legal rights of employers and employees beyond anything awarded, the words and the spirit of the constitutional provision are alike broken. And, if Parliament can do it in this case, we can see no limit to its power. If it has such complete power that it can lengthen the arbitrator's period, it can shorten it. If he thinks a certain wage should last for five years, Parliament may, notwithstanding his decision, alter the period to one year. And if the parties have expressly agreed under sec. 24 to a fixed term and ended their dispute on that definite basis, then, as that is, when certified, "deemed to be an award," and consequently within sec. 28 (2), Parliament, if the view we are contesting be right, can validly alter the deliberate agreement of the parties—fixed (say) for one year—so as to make it binding on them for twenty years. The decision in the case of *Federated Engine-drivers' &c. Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1) establishes the position that the agreement made under the terms of sec. 24 (1), when so certified, is an award "within the meaning of the Act." Indeed, it could not validly otherwise have any binding effect under the power granted by sec. 51 (xxxv.).

(1) 28 C.L.R., 1.

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If the alternative view suggested be relied on, of presumed acquiescence by the arbitrator in what the Parliament has in sec. 28 (2) enacted, even if he expressly says "one year only," then in whatever may be said by Parliament he could be said to acquiesce if only he makes some award. Whatever Parliament may choose to enact as the effect of an award once made, the arbitrator, on that basis, would be supposed to adopt and to adjudicate. If time fixed by the arbitrator can be doubled by Parliament itself, so can wages. That would, in our opinion, be beyond the competency of Parliament; but only because the power to affect rights and impose duties in relation to industrial disputes is limited to the medium of arbitration. Parliament enacts the binding force that is to enure from the arbitrator's decision, and can choose the distance it will go in giving authority to the arbitrator. The Constitution, however, has restricted Parliament to the one medium if it wishes to exercise the power at all. But, as a fact of life and experience which no legal theory can displace, the time during which an award is to operate, which embraces both the time when it is to commence and the time it is to end, is a most material factor both in itself and in relation to the justice of the other terms. Why else does the arbitrator deliberate as to the proper term, or why does he even include that term as a proposed provision which the parties are invited to debate before the award is finally made? If a business man or his employees in dispute were asked whether they considered the duration of an award a material term in the settlement of the dispute, it cannot be doubted what their answer would be. Is it, or is it not, a fact of great importance as an element of dispute, how long the new conditions asked for are to last? We can hardly conceive of any doubt on the matter. The Constitution uses no terms to limit the subjects of the arbitration so long as it is confined to an industrial dispute; but outside that, no power at all exists in the Commonwealth Parliament to create rights or impose duties between employer and employee. Parliament itself has included in "industrial matters" the all-embracing expression "all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." Indeed, we can hardly conceive it

arguable that that expression does not comprehend the question of the period during which the new conditions of employment are to operate.

Certainly Parliament itself thought the period very material, because it would not even trust the judgment of the arbitrator beyond five years, even with all the light that evidence as to present circumstances could afford. Industrial circumstances change so rapidly that the matter seems self-evident. Wages in a war period and in a peace period are essentially different. To extend provisions that are found to be just for one year to five years is an essential variation. We cannot express our opinion in this respect better than by quoting that of our late brother *Barton* and our brother *Gavan Duffy*, in the case of *Australian Sugar Producers' Association* v. *Australian Workers' Union* (1), in a judgment which we only refer to for the weighty opinion expressed, where the former said :— "I am of the opinion suggested by my learned brother *Gavan Duffy* during the argument. It is not the same thing to make an award for a period of nine months from now, and to make an award to operate for twelve months from a date three months past. The reason is that even if they were couched in the same terms in other respects, the award might in the one case be entirely equitable and in the other grossly inequitable. The one of such awards is substantially different from the other, and it cannot be said that the Court which made the one would have made the other." This opinion is, of course, as applicable to an award under the Federal Act as to an award under any other Act, because it relates to the inherent nature of an award upon an industrial dispute. The same opinion was judicially enforced by the Supreme Court of New South Wales in 1906. In *Ex parte Master Tailors' Association* (2) the Full Court of New South Wales held that even where the Act made no express provision for a specified period to be awarded, once the arbitrator fixed the period he had no power to extend it. *Darley* C.J. said (3) :—"The main object of the Act was, I apprehend, to terminate industrial disputes, and to give confidence both to employer and employee, that for a certain period of time there would

(1) 23 C.L.R., 58, at pp. 73-74.
(2) 6 S.R. (N.S.W.), 253.
(3) 6 S.R. (N.S.W.), at p. 255.

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be no dispute arising between them as to the conditions of the industry. It would give confidence to the employer, who would know exactly what he had to do and what he had to pay, and to the employees, who would know exactly what they were to be paid, what hours they were to work, &c., &c., and that during a certain time the award could not be infringed." *Cohen* J. (1), who had great experience in the Industrial Court, said: "I think the time which the award is to last is one of its most essential elements, and in point of fact this forms in all references one of the matters to which close attention is given during the hearing." That decision, which was given while the New South Wales Act did not require a period to be specified, was followed and applied by *Heydon* J. in *Sydney and Manly Ferry Employees' Union* v. *Port Jackson Co-operative Steamship Co.* (2). In *In re Saddlers' Award* (3) *Heydon* J. said: "Part of the award is the time for which it shall endure." The result is that in enacting sec. 28 (2) Parliament is departing from arbitration and enacting, as if it were a plenary Legislature, what new and independent obligations outside the arbitrator's award shall subsist between individuals as an industrial law. We consider that incompetent. It may be convenient or it may be expedient, or it may not. Even if both convenient and expedient, that would not be sufficient to confer Federal power to affect State laws. There is, however, not even the pressure of practical necessity. Parliament can always give the arbitrator affirmative power to extend an award if he, on a review of the circumstances, thinks it just. But, not having done so, its own direct assumption of the power appears to us unwarranted, and we are obliged so to declare.

The words in sec. 51 which precede the enumeration of powers, namely, "with respect to," are words not of enlargement but of indication. They indicate that you are to look to the following enumeration to see the actual subjects of power. Among them is pl. xxxv., which has to be interpreted as it stands according to its own terms, which bear their own limitations. Parliament has no more power to enlarge the meaning of "arbitration" than it has to enlarge the meaning of "industrial disputes" or, as already decided

(1) 6 S.R. (N.S.W.), at p. 256. (2) (1906) N.S.W.A.R., 360, at p. 365.
(3) (1905) N.S.W.A.R., 329, at p. 330.

by this Court, to enlarge the meaning of "trade marks." So far as any argument of validity rests on the words "with respect to," the decision in *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (1) is decisive, and, whatever may be thought of the application of the principle to the circumstances of that case, the principle itself was concurred in by four out of five Justices, and has never since been qualified. Inasmuch as we think sub-sec. 2 is beyond the competency of Parliament, it may, in our opinion, be disregarded. The claim, therefore, for the whole period on and after 1st May 1919 is, we think, within the powers of the arbitrator, and in our opinion he may do what he thinks just in relation to the claims in question.

HIGGINS J. I am of opinion that both questions should be answered in the affirmative.

The first question turns on the construction of sec. 28 (2) of the Act. The second question turns on the effect of the High Court decision of 16th April 1919.

As for question 1, there was a previous award of 1st May 1914 for five years, expiring on 1st May 1919, and prescribing a minimum wage. A new award was announced (though not yet actually made) on 13th October 1919; and it is urged that the new award cannot prescribe a minimum rate for work done between 1st May and 13th October. It is not contended that there was not *in fact* a dispute extending beyond one State as to the minimum rate to be paid as from 1st May onwards; or that if there had not been the previous award the Court of Conciliation could not have, on 13th October, prescribed the minimum rate as from 1st May onwards. The second point has just been determined in the case of *Federated Engine-Drivers' &c. Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (2). The only contention is based on the words of sec. 28 (2).

The words of sec. 28 (2) are as follows: "After the expiration of the period so specified, the award shall, unless the Court otherwise orders, continue in force until a new award has been made." These words apply here to the previous award of 1st May 1914, and to that award only. They do not purport, in the least, to say

(1) 6 C.L.R., 469. (2) 28 C.L.R., 1.

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what can or cannot be done in the new award. Indeed, if we once clearly grasp the fact that sec. 28 prescribes rules applicable to all awards, one by one, and does not in the least attempt to dictate to the Court what should be done as to a new dispute which takes place in fact after any award, much of the difficulty of the case would disappear. These words do not, as seems to be assumed, say that the *minimum rate* prescribed in the previous award shall " continue in force " until the new award be made, but merely that the *previous award* shall continue in force—obviously in order to prevent the parties from being without all regulation until the new award be made—to prevent industrial chaos in the meantime. The existence of an obligation to pay 1s. 9d. per hour at the least for work done from 1st May to 13th October is not inconsistent with the creation on 13th October of an additional obligation to pay 6d. extra per hour for that work.

To my mind it seems clear that a direction that the previous minimum rate " shall continue in force until the new award has been made " does not mean an exclusion of the power to make an award on the same subject, if otherwise proper to be made. This is clear as between two different tribunals ; for in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1) it was held by the Full High Court that a determination of the Victorian Wages Board for 8s. per day minimum rate continued in force, although the Commonwealth Court had prescribed 9s. The two prescriptions are not mutually repugnant : they can both be obeyed. " Continue in force " does not mean " prevail over everything else " : in rowing against a current the current continues in force, but the oarsmen may apply greater force. " Continue in force " does not mean " continue *exclusively* in force "—does not mean that no other order in a new dispute is to touch the same subject for the same period : a direction that the imperfect ropes of a scaffolding shall continue to hold it until new ropes have been attached is not disobeyed by attaching new ropes while the old remain.

To test the meaning of the words, I take an analogous case. An order has been made for payment of £2 per week for the maintenance of a child until the age of eighteen, and when that age has been

(1) 10 C.L.R., 266.

reached application is made for an increase to £3. The Court, thinking that some person in foreign parts should be served, and that there should be an opportunity for further investigation, directs that the previous order shall "continue in force" until any new order be made. That direction does not prevent the Court from increasing the allowance to £3 as from the day that the infant attained eighteen. The obligation to pay this £3 a week does not arise till the new order has been made. The trustee is not guilty of contempt of Court in not paying the increased allowance each week since the infant attained eighteen, but he has to make up to the child's guardian the difference between the £2 and the £3 per week as from the eighteenth birthday.

What then remains in sec. 28 (2) to except this two-State dispute as to the proper minimum rate from 1st May 1919 onwards from the comprehensive words of sec. 4—"industrial dispute includes *any* dispute as to industrial matters"; or of sec. 18—"the Court shall have jurisdiction to prevent and settle, pursuant to this Act, *all* industrial disputes"? "Pursuant to this Act" means simply in the manner prescribed by the Act; there is no indication of any desire to limit the disputes as to which there is to be jurisdiction or cognizance. Under sec. 19, the Court is to have cognizance of "all" industrial disputes which come before it by any one of four methods, and it is to prevent or settle them as directed in secs. 23, 24, &c. The express object of the Act is "to prevent strikes in relation to industrial disputes" (sec. 2); and as there may be a strike as to wages from 1st May to 13th October, why should we attribute to Parliament the foolish intention of leaving the Court powerless to deal with such a dispute—powerless even to summon a compulsory conference? If the Court cannot deal with disputes of this nature, it would seem to follow that strikes as to such disputes are not made illegal and penal by sec. 6.

In the previous arguments we have been embarrassed by the decision in the *Gas Employees' Case* (1), and by the reasons given for that decision. But now that case has been boldly impugned by counsel for the claimant, and we are free to consider sec. 28 as a whole. Sec. 28 (1), in my opinion, deals with the duration of the

(1) 27 C.L.R., 72.

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award—the words "continue in force for a period to be specified in the award, not exceeding five years" give the duration. The marginal note—"Form and continuance of award"—states truly the only object of the section. Parliament uses the words in order to prevent the award from being perpetual. Sec. 28 (2) provides for the time after the award has expired—that existing conditions shall continue until the new award be made. There is not any indication of intention to exclude from treatment by the Court any new two-State dispute which in fact arises during the specified period or afterwards—say, in respect of a new minimum rate if the cost of living has doubled. Sec. 24 directs the Court to settle every industrial dispute (see sec. 23), whenever it arises—to settle it by agreement, if possible; otherwise, by award. The words used are "by an award determine"—that is, determine *the dispute*. Confusion has arisen from treating the settlement of a concrete *dispute* as if it were the settlement of an abstract *subject*, such as the subject of minimum wage. The determination of a dispute is conclusive and binding as to that dispute; but it is not conclusive or binding as to a *new dispute*, even on the same subject. The dispute in this case is not the same dispute as that of 1914. It involves a claim for a different minimum; and it is not even a dispute between the same parties. It is true that "most" of the two hundred and seventy-nine respondents in this case were respondents in the 1914 case (par. 2 of case stated); the exact number and names of the respondents who are to be subject to this award and were not subject to the 1914 award appear from the award of 1914 and in the High Court order of 1919, both of which are incorporated in the case stated. A dispute as to which A, B and C are parties is a different dispute from a dispute to which A, B, C, D down to Z are parties, and it has often to be settled on a different basis.

This view of sec. 28 is inconsistent with the actual decision in the *Gas Employees' Case* (1) as to question 1 in that case. That case decided that for the five years specified in the award of 1914 the parties must rest satisfied with the award (subject only to variation within the limits of the original claims of 1914)—that there can be no new dispute entertained upon the subject of minimum rate

(1) 27 C.L.R., 72.

during the five years. But the judgments given in that case recognize that such a dispute can be entertained *after* the five years. For the purposes of the claimant in this case, it is not necessary to insist on the full contention which I have expressed; and Mr. *Dixon* puts the alternative view that the words "continue in force" *at the most* prevent a second award containing terms which impose obligations inconsistent with the performance of obligations imposed by the previous award; and that an obligation to pay 12s. per day would not be inconsistent with an obligation to pay 10s. All that the claimant has to establish is that there is nothing in sec. 28 (2) to prevent relief being given as to work done between the expiry of the five years and the actual making of the award in the new dispute. If the new dispute apply, as it applies here, to the whole period subsequent to the specified period, the Court has the duty (sec. 24), as well as the power, to decide as to the period from 1st May onward.

I do not discuss fully here the meaning of the words "unless the Court otherwise orders" contained in sec. 28 (2); for they are not so vital to our decision as the words "continue in force," and their exact meaning may be fairly disputable. They were probably mainly intended to enable the Court in making any award to except from it the general rule that awards are "to continue in force" until a new award—*e.g.*, in such case as a special award for a particular wheat season. But Parliament does not mean to limit to such a case the power of the Court to make an exception; it meant to leave the statutory provision flexible, trusting the Court to do the right thing on the examination of all the circumstances in any proper proceeding. Indeed, when the items of an award are numerous such an exception as suggested would generally be most fatuous; for, as under the section there can only be one *terminus ad quem* for any award, the order forbidding continuance would have to apply to all the items—items which the parties wish to retain as well as the other items. Thus a satisfactory regulation of hours or of weights to be carried would have to be terminated, and the old anarchy restored, in order to enable the Court to deal with some claim as to wages. At present I am inclined to read the words as equivalent

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to " subject to any order made by the Court in the award or otherwise *in the same dispute.*"

In the argument against the power to award in October in respect of work done from May to October, stress is laid on the importance to employers of certainty as to the regulations which they are to obey for any period. No doubt certainty is desirable, but it is not so important to employers and the public as to have no strikes or stoppages ; and certainty is not the object of the section, as it allows variations of the award during even the specified period. Certainty is not always possible—as in the case of merchants who make contracts without knowing the movements in exchange to which they may be subjected in the meantime. Moreover, in a case of the present kind, master stevedores necessarily know that there is a dispute, and could make provision in any contract for any increase in the minimum rate within the limits of the plaint. They always do make such provision, so far as appears.

The object of sec. 28 (2) is merely to keep existing conditions alive until the new award can be made. The Court of Conciliation has fixed the conditions ; the Parliament accepts the results of the Court's investigation, and says that the obligations shall remain in the interregnum.

It is urged also that there is a presumption against the law being retrospective. When Parliament uses general words it is properly assumed that they apply to the future, not the past ; for example, it is presumed that Parliament does not mean to make an act a trespass or an offence, which was not a trespass or offence when done. But the presumption is based on common sense, and it cannot be applied with equal force to the powers of a tribunal entrusted by Parliament with the duty of examining the circumstances of each particular case and of deciding what is just and fair. If hours are reduced by the award, the Court would never, I suppose, make the employer liable for not observing the reduced hours before the award is made ; but if wages are increased the position is very different. In my view, the employer would come under a new obligation in October to pay some extra money in respect of time that has passed but which is within the ambit of the dispute. The obligation proposed to be created here is a future obligation, although

it relates to work done before the award. As Lord *Denman* pointed out in *R.* v. *St. Mary, Whitechapel* (1), a statute to the effect of the proposed award "is in its direct operation prospective, . . . it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." (See also cases cited in *Maxwell on Statutes*, 5th ed., pp. 358 *et seq.*) It is a mistake to think that the new award as proposed is to "take effect" during the period before it is made; it "takes effect" only *when made*, as to work done in time as to which the new dispute existed. It does not say that the new rate *was* payable during the period after 1st May, but that it is now, on and after 13th October, payable for the work done in that period.

In truth, the presumption properly applicable in this case is that Parliament, in using words with the purpose of substituting methods of reason for methods of strike, does not mean to make the methods of reason inapplicable to any period to which a dispute in fact relates—does not mean that the Court shall be powerless, stand helplessly by while in actual fact there is a dispute which may paralyse industrial operations; in short, it is a fair presumption that Parliament does not mean nonsense.

The second question becomes of importance if the answer to the first question be in the negative. If the Court of Conciliation has not power in October to prescribe a minimum rate as from the expiration in the previous May of the period specified in a previous award, yet the High Court has decided, under sec. 21AA, that the Court has that power *in this case*; and that decision is "final and conclusive." The decision, dated 16th April 1919, is that on that date there "exists" a dispute extending &c. as to the minimum rate to be paid as from 16th April onwards; and, according to the answer to the second question in the *Gas Employees' Case* (2), this decision means that the Court of Conciliation is "competent to entertain" that dispute. Question 2 in the *Gas Employees' Case* (3), as asked by a Justice of the High Court under sec. 21AA, is express:—"Am I justified in finding that there is an industrial

(1) 12 Q.B., 120, at p. 127.
(2) 27 C.L.R., 72.
(3) 27 C.L.R., at p. 75.

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dispute existing . . . on the subjects of the said claims? And if the said Court" (the Court of Conciliation) "is not competent to entertain the said claims, am I still justified in finding as aforesaid?" The answer of the Full High Court was "No" to both branches of the question. It follows that if there is a decision that the dispute exists, it involves a decision that the Court of Conciliation is competent to entertain the dispute. "Justified" in the question asked, and in the decision of the Full High Court, means justified in law—as Mr. *Beeby* admits. In his attempt to meet this difficulty, Mr. *Beeby* contends that the decision under sec. 21AA is conclusive only as to facts; but he has adduced no reason or authority in support of his contention. The object of sec. 21AA was to relieve the Full High Court of the lengthy and learned discussions as to the meaning of "dispute" within the Act, and of "dispute extending beyond one State," as well as to relieve the parties concerned of the intolerable uncertainty and the waste of time and effort and money involved in proceedings before the Court of Conciliation, which were sometimes made futile subsequently by applications for prohibition. It was because law was involved in the inquiry, because the question was one of mixed law and fact, that the decision was committed to a High Court Justice. The *Gas Employees' Case* (1) established that the competency of the Court of Conciliation to entertain the claim is necessary to the decision of the High Court under sec. 21AA; and the decision is now conclusive as to all matters, of law or fact, necessary to the decision (*Flitters* v. *Allfrey* (2); *Priestman* v. *Thomas* (3)).

It so happens that I was the Justice who gave the decision, and it is unpleasant for me to have to press the decision as being conclusive. If I were deciding the matter after the Full High Court expressed its views in the *Gas Employees' Case* (1), I should probably not have decided on 16th April that the dispute existed on that date. The objection was then taken by some respondents that there could be no new dispute entertained as to the minimum wage as for the period specified in the previous award; but, on being assured that no new award would be made as to that time, these respondents

(1) 27 C.L.R., 72. (2) L.R. 10 C.P., 29.
(3) 9 P.D., 70; 210.

waived the objection. No objection was taken that an award could not be made as to all the time *after* the period specified—after 1st May 1919. This—the High Court proceeding—was the time for taking such an objection; and it was not taken. There stands the decision, right or wrong; the parties to the decision, at all events, have a vested right to or are bound by the decision; the workers kept working from 1st May onwards in the belief that the wages from that date would be subject to the new award; the two hundred and seventy-nine employers—with the exception of the fourteen who appeared here (increased now to forty-two) to argue against the proposed award—accepted the decision, and have paid or are willing to pay the extra wages as from 1st May. In my opinion, the decision of 16th April is "final and conclusive" under the Act; and my answer to the second question is Yes.

In their judgment in the *Gas Employees' Case* (1) my brothers *Isaacs* and *Rich*, as well as my brother *Powers* and myself, pointed out the unsatisfactory and dangerous position resulting from the decision in that case—that the Court of Conciliation is powerless to entertain a new dispute during the specified period. It means that if an award be made for five years, and if during the five years the cost of living should increase tenfold, the Court would have no power to deal with claims for any increase of wages beyond the original claim made in the dispute on which the award was made. It is no good to tell men that their wages may be increased as to future years: everyone knows that it is the existing terms of employment that count; it is the immediate pressure that pains. Industry may be brought to a standstill by actual disputes, but the Court is merely to look on and do nothing. As *Powers* J. said (2), the employees have, according to the *Gas Employees' Case*, no course open but to resort to strikes to enforce their claim for relief, unless Parliament sees fit to amend the Act. *Isaacs* and *Rich* JJ. went so far as to suggest a form of the amendment (3); but the Crown Law Office has not, so far as appears, taken any notice of the warnings. The result has been disastrous. Since the decision of the Full High Court there have been strikes to which, to my knowledge, the decision has

(1) 27 C.L.R., 72. (2) 27 C.L.R., at p. 100.
(3) 27 C.L.R., at p. 87.

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powerfully contributed. The men know that the Court of Conciliation has no legal power during the period specified in their awards to concede or entertain their new demands, and they see no course open but to strike. If now the decision be that any new award can only operate as to work done in time subsequent to the new award, however long the new award may be delayed, it is easy to see how much the temptation to strike will be increased. Nothing has contributed so much to the prevention of strikes as an assurance from the Court that the men will not lose by any delay; but, if the forty-two respondents are right, that assurance can no longer be given. All that I can do is to call attention again to the urgent need for an amendment of sec. 28, declaring what Parliament means and meant, and freeing the Court from the shackles imposed by these cases. It is monstrous to find that there are two periods of time as to which the Court is incompetent to grant any relief, no matter how violently circumstances may change—the time before the period specified has expired, and the time after the period specified but before a new award has been made. The difficulty here does not arise from the Constitution; it arises under an Act of Parliament, and the Act can be amended by Parliament.

As to the constitutional ground on which my brothers *Isaacs* and *Rich* see their way to answer in the affirmative the first question asked in this case, I concur in the opinion that the ground is not tenable, and that sec. 28 (2) is valid. It is agreed on all sides that Parliament cannot affirmatively or directly prescribe conditions of employment by its own enactment; but it can make any laws that it thinks fit "with respect to" conciliation and arbitration, &c. (sec. 51). Here Parliament does not even say that a certain *minimum rate* shall "continue in force," but what it says is that a certain *award* shall continue in force. It is unnecessary in this case to decide how far Parliament can put limitations and conditions on the power of the Court which it creates to prescribe the terms of settlement of the dispute; for in this case all that Parliament has done is to state *the duration of the award*, not any terms of settlement of the dispute. The duration of the award was not one of the industrial matters in dispute. There was nothing in the log of 1914 as to the terms of

the award. There was no substantive dispute on the subject. Parliament merely says to the Court which it creates : " When you settle a dispute by award the award is to last for any period you specify not exceeding five years, and afterwards until the new award—not for any longer or for any shorter time." If Parliament has power to create a tribunal which might order maintenance of deserted wives, Parliament could surely say that the order is not to last more or less than five years.

I may add that the point of invalidity was not suggested in either proceeding before me, or present to my mind when I stated this case for the opinion of the Full Court.

I should add that it would not be proper for me, usually, to pronounce an opinion on this important question of the validity of an Act of Parliament, inasmuch as I take the view that the proposed award as to a minimum wage would, on the true construction of sec. 28 (2), be valid. Personally I can answer the question actually asked in the affirmative, even if the section is valid. But as there must be a concurrence of four Justices on constitutional questions, and as my view of the meaning of the section is not accepted, my colleagues say—I think justly—that it is my duty to express a definite opinion as to the validity of the Act.

GAVAN DUFFY J. In the argument addressed to us it was conceded that an award finally settled the industrial dispute with which it dealt, subject to the power of variation contained in sec. 28 of the *Commonwealth Conciliation and Arbitration Act*. The basal controversy between counsel was this : on the one side it was said that the parties to an industrial dispute which had been settled by an award might again dispute about the same subject matter, and so obtain a new award in a new dispute ; on the other side it was said that any of the parties to an industrial dispute which had been settled by an award might of course express the continuance or renewal of their old discontent, or the inception of a new discontent with respect to the subject matter of that award, or with respect to that award itself, but they could not construct a new dispute out of the materials of the old dispute if those materials were the subject matter of an existing award in the old dispute. I adhere to

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what I said on this question in the *Gas Employees' Case* (1). An industrial dispute within the meaning of the Act is a dispute not already settled under the provisions of the Act; and an alleged industrial dispute which presents for determination only questions which are disposed of by an existing award is not a new dispute, but only a recrudescence of the old dispute settled by that award. The subject matter of the present alleged industrial dispute has been dealt with by an award which is still in force and binding on the parties to the present alleged industrial dispute if sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act* is valid, and if it merely has the effect of extending or enlarging the period of operation of an award. In my opinion it is valid, and has merely this effect. I agree with the Chief Justice in thinking that the subsection does no more than delimit the period during which an award may subsist as an instrument binding on the parties whom it affects, and that it is therefore within the competence of the Commonwealth Parliament under the provisions of sec. 51 (xxxv.) of the Constitution. Because I think it does this, and no more than this, I am unable to agree with him in thinking that it contains any prohibition, express or implied, against making a new award with respect to the subject matter of an existing award. The incapacity to make such an award rests on the want of the necessary subject matter, namely, a question in issue in an unsettled industrial dispute. If sec. 28 had never formed part of the Act, or, if having formed part of it, it were repealed, the proposition would still be true that while an award determining the questions in issue in an industrial dispute remains in force and binding on the parties to it, the questions so determined cannot form the basis of a new industrial dispute. If what I have said is correct, it is clear that our answer to the first question submitted for our consideration should be No. With respect to the second question the position is this: *Higgins* J., exercising the jurisdiction of this Court under sec. 21AA of the Act, has already decided that an industrial dispute within the meaning of the Act (that is, an unsettled industrial dispute) does exist. Though this decision is not in my opinion correct, it is binding on him when dealing with the case as President of the Commonwealth Court of

(1) 27 C.L.R., 72.

Conciliation and Arbitration, and on us when advising him under the provisions of sec. 31 (2). If an unsettled industrial dispute exists in this case, the Commonwealth Court of Conciliation and Arbitration has jurisdiction to settle it pursuant to the Act (sec. 18), and so to make an award in a form and for a period authorized by sec. 28. In my opinion our answer to the second question should be Yes.

POWERS J. The questions of law submitted for the opinion of this Court have already been stated. It was contended by the respondents that the first question should be answered in the negative on the following grounds: (1) that sec. 28 (1) only authorized the Arbitration Court to make awards for periods not exceeding five years *from the date of the award*, and therefore that no award could be made by the Court in respect of disputes for payment of work done before the date of the award; (2) that, assuming that an award could be made in an ordinary case, no award could be made in respect of work done while the previous award continued in force, by virtue of sec. 28 (2)—this claim was chiefly based on the decision of this Court in the *Gas Employees' Case* (1). It was contended by the organization and by the Commonwealth as intervener: (1) that sub-sec. 2 of sec. 28 was *ultra vires* the Constitution, on the ground that the only power given to Parliament was to make laws with respect to the prevention and settlement of disputes by conciliation and by arbitration, and, therefore, it could not by an Act, for any definite time or at all, fix rates of wages to be paid by employers after the expiration of the specified period fixed by the arbitrator in an award. For that reason sub-sec. 2 of sec. 28 was not any bar to the Arbitration Court making an award in respect of work done after the expiration of the period specified in an award previously made by it. The organization also contended: (2) that the Court had power to make the award in question even if sub-sec. 2 of sec. 28 was *intra vires*.

As to the first ground raised by the respondents. This Court has decided, in *Federated Engine-Drivers' &c. Association* v. *Adelaide Chemical and Fertilizer Co.* (2), that the Arbitration Court, where it has cognizance of a dispute pursuant to the Act, can make an award

(1) 27 C.L.R., 72. (2) 28 C.L.R., 1.

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as to matters in dispute from the date of the dispute, and in respect of work done before the date of the award. That objection to the proposed award therefore fails. The objection that the Court is bound to answer the first question in the negative because of the High Court's decision in the *Gas Employees' Case* (1) also fails, because this Court in the *Gas Employees' Case* only decided that the Arbitration Court could not make an effective award in respect of a new dispute before the expiration of the "specified period" of an existing award, either because the Court was not competent to make such an award—although a *de facto* dispute existed (sec. 28 (1))—or because no dispute within the meaning of the Act could arise before the expiration of the specified period (sec. 28 (1)). The effect of sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act* on a dispute that is found to exist has never been the subject of decision in this Court. Further, in the *Gas Employees' Case*, on the facts set out in the special case, the High Court had not decided under sec. 21AA of the Act that there was an existing industrial dispute. In this case the High Court has decided that question. This Court, therefore, is quite free so far as the decision in the *Gas Employees' Case* is concerned.

It was agreed to hear argument as to whether the decision of the majority of the Court in the *Gas Employees' Case* (1) was right, but assuming that the decision in that case is approved the Court is still quite free—so far as that decision is concerned—for the reasons mentioned, to decide both the questions submitted in this case.

So far as question 1 is concerned, this Court has to decide whether the Commonwealth Court of Conciliation and Arbitration can make an award requiring payment after the date of a new award for work done prior to the making of the new award but after the date of the expiration of the specified period (sec. 28 (1)), notwithstanding sub-sec. 2 of sec. 28. The sub-section has been quoted. I agree with my brother *Higgins* as to the meaning and effect of the words "continue in force" in sub-sec. 2; and also that the new award only compels compliance with conditions imposed after it is made, and does not in any way prevent the old award and all conditions imposed by it continuing in force until the new award is made.

(1) 27 C.L.R., 72.

The old award only fixed a minimum, not a maximum, wage to be paid during its continuance. The award only amounted to a prohibition not to pay less than the rate fixed. The proposed new award does not attempt to alter that condition during the continuance of the old award ; it only orders that in settlement of the new dispute a sum shall be paid after the new award is in force in respect of work done after the expiration of the specified period named in the old award. This view is, I think, borne out by the judgments of the majority of the Court in *Federated Engine-Drivers' &c. Association* v. *Adelaide Chemical and Fertilizer Co.* (1), by which it was held that an order for payment after the date of the award of a higher rate of wages than had previously been paid for work done before the award was made, did not render employers liable for penalties if they had complied with existing conditions before the award : that is, that the conditions existing before the award continued in force until the date of the new award, and the award was only effective from its date.

The difference between sub-sec. 1 and sub-sec. 2 of sec. 28 was recognized by my brothers *Isaacs* and *Rich* in their judgment in the *Gas Employees' Case* (2), in which they said :—" Equally plain is it that after the specified period the Arbitration Court could proceed to deal with a new industrial dispute even on the same matters. . . . If the arbitrator thinks fit he may declare " (sec. 28 (2)) " that it " (the award) " shall no longer continue ; but, if he says nothing and it continues in force, it shall not continue in force for ever, but only until he exercises the power which, once the specified period has elapsed, he possesses, namely, the power to make a new award, which expression, applying only to that subsequent period, involves the antecedent power, since the expiry of the specified period, to take cognizance of a new industrial dispute." I agree with what my learned brothers said in that case about sec. 28 (2) in the words quoted. It is clear, therefore, that the day after the expiration of the specified period a new cognizable dispute can arise, and can be dealt with by the Court and a new award made on that day by consent, or otherwise, although the old award is to continue in force until the new award is made.

(1) 28 C.L.R., 1. (2) 27 C.L.R., at pp. 85-86.

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This Court has held that wherever there is a cognizable dispute and no prior award prevents it, an award can be made in respect of work done from the date of the dispute; so that, if a dispute arose and could not be settled the day after the expiration of the specified period, the award when made can include an order as to rates to be paid for work done after the date of the dispute.

In this case it is not contended that there was not a dispute brought before the Court in pursuance of the Act, or that that dispute was not in existence on 1st May 1919, the day after the specified period, or that the Court had not cognizance of it on 1st May and on 13th October 1919. The only part of the Act referred to, which it was contended prevented the Court having cognizance of the dispute so as to make an award was sub-sec. 2 of sec. 28, which, as I have pointed out, necessarily permits a cognizable dispute to arise after the specified period has expired; otherwise the new award it provides for could never be made. The only limit the Act puts on any award the Court can make is that it shall only continue in force—subject to any variation ordered by the Court—for a period specified in the award not exceeding five years from the date of the award. All the terms of the new award are left to the Commonwealth Court of Conciliation and Arbitration. The dispute that was settled by the prior award was only settled by the Court until the expiration of the specified period: the Arbitration Court could not legally settle it for a longer time. The old dispute having been settled and the term for which it was settled having expired, the Arbitration Court could not refuse to make an award in a new dispute on the ground that it was settled by the old award beyond the expiration of the specified period. Sec. 28 (2) recognizes that the new cognizable dispute can arise after the expiration of the specified period, and the continuance in force of the old award must, under the Constitution, be subject to any settlement of the dispute by conciliation and arbitration. I do not find anything in sec. 28 (2) to limit the power of the Court to make the new award referred to in that sub-section. I hold that sec. 28 (2) does not prevent the Court from making an award in this case at any time after the expiration of the specified period, and, for the reasons previously mentioned in this case, in respect to work done after 1st May 1919. The dispute as to

wages from 1st May 1919 was properly before the Arbitration Court: the High Court had decided that a new dispute cognizable by the Court existed; the Court had cognizance of it; and under sec. 24 of the Act it is its duty to make an award settling that dispute. The Act says that the Court shall make an award in settlement of disputes of which it has cognizance in pursuance of the Act. The answer to the first question should be: Yes, as from the expiration of the period specified in the previous award.

As to the second question—"Having regard to the final and conclusive effect of the decision of the High Court under sec. 21AA, has this Court power in this case to prescribe minimum wages as from 1st May 1919?" Sec. 21AA empowers the High Court to give a decision on the question whether an alleged industrial dispute submitted to the Court in pursuance of the Act or any part thereof exists as an industrial dispute extending beyond the limits of one State. The Arbitration Act empowers and requires the Arbitration Court to make awards when such an industrial dispute is submitted to the Court. Any decision given under the section is to be final and conclusive. The High Court has decided that the industrial dispute between the parties extending beyond the limits of one State alleged in the plaint, existed on 16th April 1919 as to certain matters, including the minimum rate of wages per hour (see par. 5 of the special case). Before coming to a decision, the High Court, under sec. 21AA, had to consider whether the dispute submitted to the Commonwealth Conciliation and Arbitration Court was cognizable by that Court, whether there could be between the parties and was a dispute within the meaning of the Act, whether it was an industrial dispute extending beyond the limits of one State in law and in fact; and it had jurisdiction to decide all that the Full Court could decide if the question had been heard and decided by it, including the effect of any section in the Act affecting that question. One of the items claimed in the plaint (which is before the Court with the special case) was for wages per hour, and the plaint was filed before 1st May 1919. The rates are not in the plaint claimed as from any particular date, but in *Federated Engine-Drivers' &c. Association*

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v. *Adelaide Chemical and Fertilizer Co.* (1) the Court has held that the dispute may be taken to have existed as from the date the demand for wages and conditions was made by the Association and definitely refused by the employers. In *Federated Engine-Drivers' &c. Association* v. *Colonial Sugar Co.* (2) the Full Court has decided that (1) sec. 21AA is an enactment within the power of the Commonwealth Parliament and valid, and therefore binding on this Court; (2) Parliament could enact that the decision of a Justice of the High Court under sec. 21AA (4) shall not be subject to appeal to the High Court in its appellate jurisdiction. The decision of a Justice of the High Court under sec. 21AA is as binding a decision on the matter decided as if the decision had been given by the Full Court of the High Court in that particular case.

The history of sec. 21AA and the evil it was intended to remedy are well known to every member of this Court. It was not passed to enable the High Court to decide that the Arbitration Court could amuse itself by hearing disputes in respect of which it could not make an effective award : it was passed to prevent delays and the expense of applications to the Full Court of the High Court for prohibitions by authorizing a Justice of the High Court to decide finally, before it made an award, that the Arbitration Court could make effective awards in any particular dispute submitted to it in pursuance of the Act. A Justice of the High Court had jurisdiction to decide the question. He has decided it; his decision is final and not subject to appeal, and whether it was right or wrong it is binding in the case in which it was given, and binding on this Court in that case. In face of that decision, the respondents could not successfully contend in the Arbitration Court that there could not be any cognizable dispute because any award continued in force after the specified period. The High Court has decided there could be and was such a dispute in this case. The answer to question 2 should be Yes.

The only question left is the important one raised by the Association, namely, that sub-sec. 2 of sec. 28 is *ultra vires* of the Commonwealth Parliament. On the construction I place on sub-sec. 2 of sec. 28, I would agree with my learned brothers who hold that it is

(1) 28 C.L.R., 1. (2) 22 C.L.R., 103.

intra vires; but as the majority of my learned brothers hold that on a proper interpretation of the sub-section it would prevent the settlement of disputes by the Arbitration Court on such terms as the Arbitration Court thinks just as from the date of the expiration of the term for which the Court settled the old dispute under a prior award, I agree with my learned brothers *Isaacs* and *Rich*, and for the reasons so fully given by them, that the sub-section is *ultra vires*. The effect of sub-sec. 2 of sec. 28, if the construction claimed by the respondents is correct, would be that the Court can settle disputes by arbitration for a fixed term, and Parliament, by an Act, for an indefinite term. It is beyond question that there has not been any settlement of the old dispute by arbitration beyond the specified period by the Arbitration Court, or by any other authorized body or Court. If it has been settled at all after that date, it has been by Parliament for an indefinite term. The Arbitration Court was only authorized to, and did, settle the dispute for a fixed term, the specified period. It was admitted that Parliament could not by an Act have fixed 1s. a day more than the Arbitration Court fixed by the award for an indefinite period after the expiration of the specified period, or the same rate as the arbitrator fixed. It has in fact done so, if the construction urged by the respondents is accepted as correct, and it cannot do indirectly what it cannot do directly. Parliament by the sub-section, on that construction, purports to fix rates to be paid and conditions to be observed which are to take effect after the expiration of the specified period, however much they are opposed to the rates and conditions the Arbitration Court may think just in settling a new dispute arising after the expiration of the specified period for which the Arbitration Court settled the old dispute. Such a provision by a Parliament having plenary power to legislate in respect of arbitration would be within its powers, but the Commonwealth Parliament has only the power under the Constitution to make laws with respect to the prevention and settlement of industrial disputes extending, &c., by conciliation and arbitration. It has not a general power, as was contended, to make laws with respect to arbitration.

For the reasons mentioned I hold the first question should be

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answered—Yes, as from the expiration of the period specified in the previous award ; and the second question—Yes.

STARKE J. The most appropriate approach to this case is a general statement of the power of the Parliament to make laws with respect to " conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." It is clear, under this power, that tribunals can be set up and vested with compulsive jurisdiction to deal with such disputes ; that provision may be made for organizing employers and employees in associations for the purpose of presenting and resisting claims before the tribunals ; that " lock-outs " and " strikes " may be prohibited as a complemental means of making the compulsory powers of the tribunal complete. So much has been decided by this Court. It seems also clear that the Parliament could prescribe the industrial matters with which the tribunal might deal, and the conditions on which and the limitations under which the jurisdiction over those subjects might be exercised. To illustrate my meaning : The Parliament could, as it once did, exclude from the jurisdiction of the tribunal industrial disputes in relation to agricultural pursuits ; it could provide that the disputes should be brought forward in a particular manner, as by organizations of employers or employees (sec. 19) ; and it could, in my opinion, provide that an award or order of the tribunal should not exceed a given period (sec. 28).

And if the Parliament can prescribe the maximum period which the tribunal can fix for the duration of its awards or orders, it can equally prescribe, in my opinion, the minimum period which that tribunal can fix for their duration. So much is, I believe, conceded both on the Bench and at the Bar. But why has not the Parliament power to prescribe specifically that an award of the arbitral tribunal shall endure for a given period ? Because, it is said, the duration of an award is a most material factor of the dispute, and disputes can only be determined by arbitration according to the constitutional power. I quite agree that the term of the award is in many cases a most material factor in the dispute, and although the Parliament can, under its constitutional power, allow this phase of the

dispute to be settled by the arbitral tribunal if it thinks fit, I cannot follow the reasoning which denies to the prescription by Parliament itself of the duration of an award the character of a law with respect to, or in relation to, or, if you will, upon the subject of arbitration. Provisions setting up the arbitral tribunal are laws with respect to arbitration, and so are provisions limiting the jurisdiction of the Court as to the duration of its awards or giving them force or compelling their performance. Parliament admittedly can take up the award which has been made and give it efficacy and force; but it cannot, so it is contended, fix the period during which it shall have efficacy and force, but must refer that matter to the tribunal which is set up under the law with respect to arbitration. I do not agree with the contention, and, in my opinion, Parliament can, under its constitutional power, prescribe the duration of the awards and orders of the arbitral tribunal, or it can endow the tribunal with jurisdiction to determine the duration, or it can combine both methods.

The provisions of sec. 28 (1) of the Arbitration Act are therefore, in my opinion, within the competence of Parliament, for in that sub-section the duration of the award is referred to the arbitral tribunal subject to the limitation therein prescribed. Equally, the provisions of sec. 28 (2) of the Arbitration Act are, in my opinion, within the competence of Parliament, for in that sub-section the Parliament takes up an award and gives it efficacy and force until a new award is made, unless the arbitral tribunal otherwise orders. I would add that the effect attributed to sec. 28, sub-secs. 1 and 2, by the Chief Justice and by my brother *Gavan Duffy* appear to me equally within the competence of Parliament.

The first question stated by the learned President of the Arbitration Court involves, I think, two periods of time: one from 30th October 1918 to 1st May 1919, that is, from the date of filing the plaint to the expiration of the period mentioned in the award of the Arbitration Court, which is material here; the other from 1st May 1919 to the date of the making by the Arbitration Court of a new award. The case assumes, I take it, that the rates of pay and conditions sought in the present proceedings in the Arbitration Court were wholly or in part the subject matter of determination between some of the same persons in the proceedings in the same Court upon

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which the award of 1st May 1914 was made. The identity of the subject matter and the parties is a mixed question of law and fact, depending partly upon the interpretation of the award, and must be determined in much the same manner as a plea of *res judicata* is determined in the ordinary Courts of law. But I should not doubt that there is identity of subject matter and parties in cases in which the same persons claim a higher minimum rate of pay for the same class of work during the same or portion of the same time. It does not better the position of these persons if they join with others in making the claim. In so far as such persons are concerned their grievances have been determined by the award already made, and in so far as the other persons are concerned the Arbitration Court is free, in my opinion, to proceed. The crux of this case is, therefore, whether persons who have the benefit of an award can, during the period of its operation, present new claims upon the same subject matter and obtain a new award from the Court in respect of those claims.

The case is, as to the period from 30th October 1918 to 1st May 1919, governed by the decision of this Court in the *Gas Employees' Case* (1), if it be sound law ; but the Court thought it right to reconsider that case, and invited a full argument from the Bar upon the whole matter. Every member of the Court is therefore free to consider the present case untrammelled by the decision in the *Gas Employees' Case*, and I therefore proceed so to do.

In *Federated Engine-Drivers' &c. Association* v. *Adelaide Chemical and Fertilizer Co.* (2) it was decided that the Arbitration Court had jurisdiction to make awards in respect of rates of pay and conditions prior in point of time to the date of the award, if the respondents to the claim were not bound or affected by any existing award of the Court. " The provisions of sec. 28 of the Act prescribe the period during which the award, when made, shall be operative, but they do not restrict its operation to questions arising out of the relations of the parties during that period " (3). It is said that Parliament by sec. 28 (1) has limited the arbitrator's jurisdiction in cases in which an award of the Court exists. It certainly limits the power

(1) 27 C.L.R., 72.

(2) 28 C.L.R., 1.

(3) 28 C.L.R., at p. 10.

of the arbitrator to make an award for a longer period than five years from the date of the award. But to say, as did the learned counsel for the respondents appearing in this case, that it operated as a prohibition to the Arbitration Court entering on an investigation of conditions of employment which were the subject of an existing award, or restrained the remedy in respect of those conditions, appears to me to be a misunderstanding of the language and of the functions of the section. The true meaning of the section is sufficiently expressed in the words already cited.

At the same time I am satisfied that the *Gas Employees' Case* (1) was, in substance, rightly decided; but the provisions of sec. 24 and not those of sec. 28 lead me to this conclusion. The Arbitration Act contemplates the bringing of industrial disputes into the Court for the purpose of settlement; and the dispute is determined and settled, and, so to speak, passes in judgment, once an award is made in respect of the subject matter brought before the Court. Mere dissatisfaction of the parties with the settlement can, no more than dissatisfaction of the parties with the judgment of a Court of law, reopen the settlement or require a new trial of the rights of the parties. The plain object and intention of the Act is to close and end, so far as the Court is concerned, all disputes which it has settled. It is true, but nothing to the point to say, that an industrial dispute is the expression of a fact. Some industrial disputes may be cognizable by the Court and some may not; some may have been settled by the Court and some may not; in some the Court may give relief and in others not. The terms of the Act must in each case be considered before the jurisdiction or power of the Court can be asserted or denied. Matters which are the subject of determination and settlement by the Arbitration Court cannot, in my opinion, be the subject matter of a new award between the same parties during the period prescribed in the award.

The answer to the second question in the *Gas Employees' Case* (1) requires, in my opinion, some modification, and is certainly a rather misleading expression of the real opinion held by my brothers *Isaacs* and *Rich*. As I follow their reasoning the answer should have

(1) 27 C.L.R., 72.

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been: "Yes, but the Court is precluded from giving relief." I should myself have preferred to say: "No, the dispute has been settled and determined." I agree with the opinions expressed by my brothers *Isaacs* and *Rich* in the *Gas Employees' Case* (1) as to the meaning of the power to vary an award already given. It has reference to an old dispute, and not to proceedings in which a new award can be made.

The proper answer to the second period of time above mentioned, namely, from 1st May 1919 to the date of any new award, depends, in my opinion, upon the proper construction of sec. 28 (2). The decision in the *Gas Employees' Case* (1) does not actually cover this period, but it is contended that the same quality attaches to the award during the enlarged period mentioned in sec. 28 (2) as to the period falling within the term expressly prescribed in the award. In other words, the award settles the dispute during the enlarged period. But I cannot agree with this contention. The sub-section covers two classes of case: one in which the parties are content to carry on under the old award without appealing to the Court; the other in which one party, at all events, is dissatisfied with the rates and conditions prescribed by that award and raises new claims upon the subject matters mentioned in the award. In the former case the Court would not have jurisdiction because no dispute exists—all are content; whilst in the latter case serious and actual disputes may be in existence.

If I am right in denying that sec. 28 operates as a prohibition to the Arbitration Court either in the matter of jurisdiction or in the matter of relief, and merely fixes the duration of an award, it is difficult to see how the power of the Court to award upon the new claims is taken away, having regard to the decision in *Federated Engine-Drivers' &c. Association* v. *Adelaide Chemical and Fertilizer Co.* (2). The implication from the Act, and especially from sec. 24, cannot be relied upon, for there has been no settlement or determination by the Court of the subject matter beyond the prescribed period. It is contrary to the fact to say that the new claims have been the subject of determination or adjudication. What then does

(1) 27 C.L.R., 72. (2) 28 C.L.R., 1.

the statute mean? Is it that the Court is precluded from giving relief, or is it that the parties are allowed to carry on under the old award until a new award is made, leaving it to the Court to exert all its jurisdiction and powers under secs. 18, 24 and 38 and other sections as to the new claims? The latter view has every reason of convenience and justice to support it, and, to my mind, is entirely consistent with the words of the statute itself. In fact, I believe that this view makes a consistent and workable scheme. If no award has been made, the hands of the Court are free to settle the dispute, as to conditions both past and future within the ambit of the dispute; if an award has been made, the parties are, subject to the power to vary under sec. 38 (*o*), bound by the settlement during the term prescribed; if the term fixed by the Court has expired, the parties are to carry on under the old award, contentedly if they can, but otherwise until the Court can consider the new grievances and make an award unfettered by any settlement or determination that it has ever made.

I place no reliance upon the words "unless the Court otherwise orders" in sec. 28 (2), for they refer to an order affecting the continuance of the award as an award, and do not cover provisions in a new award inconsistent with those in the old award.

The second question raised by the case stated turns upon the true interpretation of sec. 21AA of the Arbitration Act. If the view I have taken of the meaning and effect of sec. 28 (2) is correct, it follows that, as to the period mentioned in the question, the High Court was right both in fact and in law in its decision under sec. 21AA. A new dispute exists, which has never been settled or determined.

KNOX C.J. The judgments which have just been delivered represent the individual opinions of the members of the Court as to the answers which they would give to the questions submitted. We have considered what is the result of these opinions, and have come to the conclusion that the questions submitted should be answered: (1) No; (2) Yes.

In view of the difficulty which the Court has felt in construing

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sec. 28, we think it is desirable for Parliament to consider the advisability of declaring clearly and unmistakably its intention.

Questions answered: (1) *No*; (2) *Yes*.

Solicitors for the claimant, *Farlow & Barker*.

Solicitors for the respondents, *Baxter, Bruce & Ebsworth*.

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

Foll
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[HIGH COURT OF AUSTRALIA.]

HOAD . . . . . APPELLANT;
PLAINTIFF,

AND

SWAN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 18, 26.

KNOX C.J., ISAACS AND RICH JJ.

Contract—Sale of land—Payment by instalments—Time of essence of contract—Failure to pay instalment—Determination of contract—Action for breach—Election—Evidence.

The respondents sold land to the appellant under a contract by which a deposit of 15 per cent. of the purchase money was to be paid at once, 15 per cent. eighteen months after the date of the contract and the balance by six equal half-yearly instalments. The contract also provided that time should be of the essence of the contract. The appellant paid the deposit but failed to pay the first instalment on the due date.

Held, that the respondents were thereupon entitled to determine the contract.